IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.190 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B. ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT - Appellant

Versus

JAGDISH RAVJIBHAI GONDALIA - Respondent

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Appearance :
MR ND GOHIL, APP for Appellant.
NOTICE SERVED for Respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B. ANTANI

Date : 05/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973, is directed against

judgment dated October 9, 1996 rendered by the learned Additional Sessions Judge, Rajkot, in Sessions Case No.4 of 1995, by which the respondent is acquitted of the offence punishable under Section 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (“the Act” for short).

2. The facts emerging from the record of the case are as under:

In or about October 94, Mr.M.R.Gohil was discharging duties as Police Sub Inspector of Gundavadi Police Chawki. When he was present in “C” Division Police Station, Rajkot, on October 7, 1994, he received an information that the respondent, who was residing in upper portion of house situated in Mill Para Sheri No.4, Rajkot, was in possession of psychotropic substance namely, Diazepam Tablets, and was selling the same. On receipt of information, PSI Mr.Gohil requisitioned services of two panch-witnesses and informed them about the information received by him. He reduced into writing the information received by him and sent necessary report under Section 42(2) of the Act to his immediate official superior. After drawing first part of

panchnama in the Police Station itself, he in the company of panch-witnesses and other police personnel, went to the place indicated in the information for carrying out raid. The raiding party went to Mill Para Sheri No.4 and entered '*della*' in which four houses in a row are constructed. The members of the raiding party climbed staircase and found that there were two rooms. On entering one of the rooms, the respondent was found present therein. On interrogation, he disclosed his name to be Jagdish Ravjibhai (the respondent). He was apprised of the information received by PSI Mr.Gohil and also about the intention of the members of raiding party to search the room. Before conducting the search, the respondent was offered that room could be searched in presence of a magistrate or a gazetted officer, but the offer was declined by the respondent. Thereupon, the room in possession of the respondent was searched. The search resulted into find of nine bottles out of which eight bottles were white coloured with yellow lid thereon whereas one bottle was painted blue coloured and was having black lid. Out of nine bottles, seven bottles were found having wrapper of paper with English writing to the effect that '*it contains 1000 tablets of Diazepam I.P.*'. The fact that tablets were Diazepam Tablets was

also mentioned in Hindi language. Below the said writing, it was mentioned that each tablet contained Diazepam I.P. 5 mg., etc. The bottles were opened and in eight bottles small plastic bags containing small tablets were found. It may be stated that on other two bottles, no wrapper as indicated above was found. As it was decided to have scientific investigation in the matter, Mr.Ashra, who was Scientific Officer, was summoned at the place of raid. He carried out scientific examination of the tablets found on the spot. He gave his opinion that the tablets were basic drugs. It was further found that out of nine bottles, eight bottles were each containing 1000 tablets, whereas one bottle, which was without wrapper, was containing 280 tablets. PSI Mr.Gohil demanded pass or permit from the respondent authorizing him to possess Diazepam Tablets. No pass or permit could be produced by the respondent. Therefore, quantity of Diazepam Tablets was seized. The quantity seized was packed and on each bottle seal bearing impression of “Police Inspector, Rajkot City” was applied. Thereafter, drawing of second part of panchnama was completed. PSI Mr.Gohil reduced into writing his complaint against the respondent. He handed over *muddamal,* panchnama, his complaint, cash recovered,

etc. to Constable Ratabhai to be handed over to Chandulal Jivabhai, who was then PSO of “C” Division Police Station. PSO of Police Station handed over *muddamal* etc. to Writer Head Mahendrabhai Pathak for safe custody. Writer Head Mahendrabhai Pathak, in turn, made necessary entry in the Register maintained at the Police Station for having received *muddamal* etc. and kept the same in a cupboard maintained in the Police Station for the purpose of safe custody of *muddamal.* On October 10, 1994, he handed over *muddamal* to Police Constable Mr.Shantilal Govindbhai with instructions to deliver the same to Forensic Science Laboratory (F.S.L.) for analysis. The *muddamal* was analyzed by the Chemical Examiner. The report of the analysis indicated that the tablets contained *Diazepam.* PSO of the Police Station handed over investigation of the complaint lodged by Mr.Gohil to Mr.Gohil himself. Mr.Gohil recorded statements of those persons who were found to be conversant with the facts of the case. On completion of the investigation, the respondent was chargesheeted in the Court of learned Special Judge, Rajkot, for commission of offence punishable under Section 22 of the Act.

3. The learned Additional Sessions Judge, Rajkot, to whom the case was made over for trial, framed necessary charge against the respondent at Exh.1. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Chemist Mr.Sanjay Vinodray Kamdar as P.W.-1 at Exh.6 to prove that the respondent purchased Diazepam tablet from his shop; (2) Dr.Anil Chhotalal Suchak as P.W.-2 at Exh.15 to prove that he had not issued any prescription to the respondent authorizing him to purchase Diazepam Tablet though such prescription was produced by the respondent before Chemist Mr.Sanjay Kamdar; (3) PSO Mr.Chandulal Jivabhai as P.W.-3 at Exh.16; (4) Writer Head Mahendrabhai Ravishanker as P.W.-4 at Exh.19; (5) Police Constable Ratabhai Dhanabhai as P.W.-5 at Exh.22; (6) Pradeepbhai Viththalbhai Lakhtariya as P.W.-6 at Exh.25; (7) Police Constable Shantilal Gonvindbhai as P.W.-7 at Exh.26; (8) Panch Manoj Pranlal as P.W.-8 at Exh.27; (9) Scientific Officer discharging duties in Commissioner's Officer Talsukh Nathalal Ashra as P.W.-9 at Exh.31; (10) Panch Mahesh Mavjibhai as P.W.-10 at Exh.33; (11) Panch Shailesh Shivlal Solanki as P.W.-11 at Exh.37; and (12) Investigating Officer PSI Mr.Mahavirsinh Raghuvirsinh

Gohil as P.W.-12 at Exh.38, to prove its case against the respondent. The prosecution also produced documentary evidence such as bills issued by Chemist Mr.Kamdar to the respondent for having purchased Diazepam Tablets at Exhs.7 to 10; necessary entry made in the Register maintained at “C” Division Police Station, Rajkot, indicating that *muddamal,* complaint lodged by Mr.Gohil, Cash Rs.46=00, panchnama, etc. were handed over to PSO Mr.Chandulal Jivabhai at Exh.17; report by PSI Mr.Gohil to PI “C” Division Police Station to register the offence at Exh.18; entry from the Register maintained at “C” Division Police Station indicating that *muddamal,* etc. was handed over to Writer Head Mahendrabhai for safe custody at Exh.20; panchnama indicating search of shop of Chemist Mr.Sanjay Kamdar and seizure of one bottle containing Diazepam Tablets at Exh.28; intimation from PSI “A” Division Police Station to Scientific Officer Mr.Ashra to come to the spot for the purpose of analyzing Diazepam Tablets seized at Exh.32, panchnama indicating search of room occupied by the respondent and seizure of Diazepam Tablets at Exh.34; rojkam prepared by PSI Mr.Gohil regarding search and seizure of Diazepam Tablets at Exh.35; complaint lodged by Mr.Gohil at Exh.39; memorandum prepared by

Mr.Gohil indicating that secret information received by him was reduced into writing as required by Section 42(3) of the Act at Exh.40; report under Section 102 of the Code of Criminal Procedure, 1973 made by PSI Mr.Gohil to the learned Magistrate at Exh.41; extract of entry made in the Register indicating that the information received by PSI Mr.Gohil was reported to his immediate higher official superior at Exh.42; report to higher official superior at Exh.47; receipt issued by F.S.L. for having received *muddamal* for analysis at Exh.51; report of analysis at Exh.52, etc. in support of its case against the respondent.

4. After recording of evidence of the prosecution witnesses was over, the learned Judge explained to the respondent the circumstances appearing against him in the evidence of prosecution witnesses, and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the respondent mentioned that the room occupied by him was neither raided nor he was arrested and that he was picked up and taken to Police Station. It was maintained by him that no bottle containing Diazepam Tablets was seized in his presence from Sanjay Chemist Store of

Mr.Kamdar nor the same was sealed in his presence. He asserted that bills produced by the prosecution at Exhs.8, 9 and 10 were not bearing his signature. However, he did not lead any evidence.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that Chemist Mr.Sanjay Kamdar had sold Diazepam Tablets to the respondent under the bills produced at Exhs.7 to 10 and that those bills were bearing signatures of the respondent. The learned Judge concluded that testimony of Dr.Suchak recorded at Exh.15, established that he had not issued prescription marked A, B, C, D to the respondent and that false prescriptions were produced by the respondent before the Medical Store to obtain Diazepam Tablets on the basis of which, Diazepam Tablets were sold by the Chemist to the respondent. The learned Judge further found that it was proved by the prosecution that in presence of panch Manoj Pranlal and Panch Shailesh Shivlal, the Police Officer had seized one bottle containing Diazepam Tablets from the shop of the Chemist. The learned Judge noticed that no satisfactory evidence was adduced by the prosecution to establish that *muddamal* bottles were

sealed at the place of the raid. According to the learned Judge, it was satisfactorily proved that the room, which was raided, was in possession of the respondent and that the respondent was in occupation of the same. The learned Judge, however, noticed that PSI Mr.Gohil, who had carried out raid, had also lodged the complaint and investigated the same, which was contrary to the law laid down by the Supreme Court in **(1) Bhagwan Sinh vs. State of Rajsthan, A.I.R. 1976 SC 985**; and **(2) Megha Sinh vs. State of Haryana, A.I.R. 1995 SC 2339,** and held that this course adopted by the Investigating Officer had caused bias to the respondent. The learned Judge held that provisions of Sections 42, 50 and 57 of the Act were complied with and that the respondent was not entitled to possess Diazepam Tablets in view of prohibition contained in Section 8 of the Act. According to the learned Judge, no reliable evidence was adduced by the prosecution to show that *muddamal* was sealed on the spot whereas evidence of Writer Head Constable Mahendrabhai, examined at Exh.19, indicated that *muddamal* bottles were containing two seals, i.e. one of 'PSI' and second of 'PI' and as this discrepancy was not explained by any of the prosecution witnesses, the respondent was entitled to reasonable

benefit of doubt arising from the facts of the case. In view of abovereferredto conclusions, the learned Judge has acquitted the respondent of the offence punishable under Section 22 of the Act by judgment dated October 9, 1996, giving rise to instant appeal.

6. This Court has heard Mr.N.D.Gohil, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. Though the respondent is duly served, he has neither appeared in person nor through his advocate.

7. From the record of the case, it is evident that the raid was carried out in the room occupied by the respondent on October 7, 1994 whereas one bottle containing Diazepam Tablets was seized from the shop of Chemist Mr.Sanjay Kamdar on October 10, 1994 and, thereafter, ten bottles were sent to F.S.L. for analysis on October 10, 1994. Though Writer Head Mr.Mahendrabhai Ravishanker examined at Exh.19 has stated in his evidence that sealed *muddamal* was kept by him in a safe maintained at the Police Station, he has

not mentioned whether the safe was locked or not nor has he stated that it was locked, and that he had maintained the key of the safe with him for three days. Though the *muddamal* was received at the Police Station on October 7, 1994, no evidence is adduced by the prosecution to satisfactorily prove that it was kept in safe custody at the Police Station till October 10, 1994 before it reached the Laboratory for analysis. Delay in dispatch of *muddamal* to F.S.L. for analysis is not explained by any of the prosecution witnesses. This becomes evident if one refers to paragraph 3 of the testimony of Writer Head Mr.Mahendrabhai Ravishanker recorded at Exh.19. A close scrutiny of the evidence on record does not indicate at all that bottles seized were sealed at the spot. This fact is neither mentioned by PSI Mr.Gohil in his testimony nor borne out from the testimony of panch-witness nor even from the contents of panchnama. Therefore, the learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses was justified in coming to the conclusion that the case against the respondent was not proved beyond doubt. What is relevant to notice from the testimony of Writer Head Mr.Mahendrabhai is that, according to him, when he was handed over *muddamal,* etc., all the *muddamal* bottles (*dabbies*) were bearing two seals, i.e. one

bearing the impression of 'PSI' and another of 'PI'. This fact is stated by the witness in paragraph 4 of his testimony during the cross-examination by the defence. No attempt worth the name is made by the prosecution to explain this discrepancy. Once the evidence of this witness is accepted as true, the case of the prosecution that nine bottles were seized and sealed with impression of 'PI' becomes highly doubtful because neither it is mentioned by PSI Mr.Gohil nor it is mentioned in the panchnama that two different seals having different impressions were used while sealing the nine bottles.

8. Further, what is mentioned in the panchnama is that seal bearing impression *'Police Inspector, Rajkot Shaher*' was used whereas the report of the analysis indicates that samples were having seal of *"Police Inspector, Rajkot Saheb"*. It means that it could not be satisfactorily established by the prosecution that the samples were properly sealed by Head of the raiding party. In these circumstances, the defect in the prosecution case that PSI Mr.Gohil, who had raided the room occupied by the respondent, had lodged the complaint and investigated the same, becomes relevant. It is true that as explained in **State represented by**

Inspector of Police, Vigilance & Anti-Corruption, Tiruchirapalli, T.N. vs. V. Jayapaul, (2004) 5 SCC 223, investigation by the same Police Officer, who had lodged the First Information Report, is not barred by law. However, there is no manner of doubt that such investigation can be assailed on the ground of bias or real likelihood of bias on the part of the Investigating Officer. The question of bias would depend on the facts and circumstances of each case and no broad or unqualified proposition that such investigation by the Police Officer, who had lodged the First Information Report, would be unfair or bias, can be laid down. However, there is no manner of doubt that absence of evidence by the prosecution to establish that a particular seal was applied on *muddamal* bottles or that *muddamal* bottles were promptly sent to F.S.L. for analysis, leads this Court to conclude that investigation by Mr.Gohil of his own complaint has resulted into bias and prejudiced the defence of the respondent. As observed earlier, one of the bottles containing Diazepam Tablets was seized from the shop of Chemist Mr.Sanjay Kamdar on October 10, 1994. Panchnama indicating the same is produced by the prosecution at Exh.28. In the said panchnama, it is specifically mentioned that bottle seized was white coloured having

yellow lid. However, Writer Head Mr.Mahendra Ravishanker, whose testimony is recorded at Exh.19, has mentioned in paragraph 3 of his testimony that on October 10, 1994, he had received another bottle *(dabbi)* having black lid. Thus, the prosecution could not even satisfactorily establish before the Court that a particular *dabbi* containing Diazepam Tablets was seized from the shop of the Chemist.

9. On overall view of the matter, this Court is of the opinion that defects which go to the root of the matter, have persuaded the learned Judge of the trial Court to record acquittal of the respondent.

10. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence

of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of **(1) Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhari, AIR 1967 SC 1124, and (2) State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417.** On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has failed to convince this Court to take a view contrary to the one already taken by the learned Judge and, therefore, the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the judgment impugned in the appeal.

[J.M.PANCHAL,J.]

[H.B.ANTANI,J.]

Rajendra